No. ~~000~~ 70-31

In the Supreme Court of the United States

OCTOBER TERM, 1970

PORT OF PORTLAND, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court wrote no opinion. The report and order of the Interstate Commerce Commission dated June 6, 1969 (A. 11–67), appear at 334 I.C.C. 419. The order of the Commission denying reconsideration and other relief (A. 579), the subsequent order of the Commission finding no issue of general transportation importance (A. 581), and the recommended report and order of the hearing examiner (A. 69–135), are not reported.

JURISDICTION

The final judgment of the three-judge district court affirming the Commission report and orders in issue was entered July 9, 1970 (A. 9). The notice of appeal

was filed September 1, 1970 (A. 585), and probable jurisdiction was noted February 22, 1971 (A. 589). The jurisdiction of this Court is conferred by 28 U.S.C. 1253. *City of Chicago* v. *United States*, 396 U.S. 162; *Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324; *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56.

QUESTIONS PRESENTED

The Interstate Commerce Commission has granted the application of two of the line-haul rail carriers serving Portland, Oregon (Burlington Northern and Union Pacific) to acquire an independent terminal railroad facility serving an industrial and port complex there; it has denied the applications of the two other line-haul carriers serving Portland (Milwaukee and Southern Pacific) for inclusion as equal owners of the facility. The questions presented are:

1. Whether the Commission's failure to examine the foreseeable transportation needs of the industrial and port complex and the public interest in multi-line competitive direct rail service there in evaluating the inclusion applications is consistent with the Commission's obligation to weigh competitive and other public interest factors in passing upon rail mergers and acquisitions.

2. Whether the Milwaukee was entitled to participate in control of the terminal railroad facility under the mandate of *Northern Lines Merger Cases*, 396 U.S. 491, where the Commission had imposed a condition requiring Burlington Northern to give Milwaukee direct and meaningful access to all Portland traffic.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding Section 1, and Sections 3(5) and 5(2) of the Interstate Commerce Act, 49 U.S.C. 3(5), 5(2), are reproduced in the Appendix to this brief, pp. 35–38, *infra*.

STATEMENT

This case involves an order of the Interstate Commerce Commission, issued under Section 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)), authorizing the joint acquisition of a heretofore independent switching railroad at Portland, Oregon, by two of the four line-haul railroads serving that city. The switching railroad, Peninsula Terminal Company, is of current interest to the carriers because it provides access to the Rivergate Industrial District, a modern industrial and port complex being developed and operated by the appellant, Port of Portland. The two railroads authorized to acquire Peninsula are the Union Pacific Railway Company and the Great Northern Pacific & Burlington Lines, Inc. ("Burlington Northern"), through its subsidiary the Spokane, Portland & Seattle Railway Company ("SP&S").[1] This case arises out of the Commission's denial—in dis-

[1] The SP&S is a subsidiary of the new company formed by the merger of the Great Northern Railway Company and the Northern Pacific Railway Company, approved by this Court last Term under the caption *Northern Lines Merger Cases*, 396 U.S. 491. As an aspect of that merger, the SP&S was permitted to lease its properties to Burlington Northern, so that it operates as an integral part of that railroad. Prior to the merger, the SP&S was jointly owned by the Northern Lines. Reference to Burlington Northern in this brief includes its SP&S operations.

agreement with its hearing examiner's recommendation—of the petitions of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee") and the Southern Pacific Transportation Company (which are the two other line-haul carriers serving Portland) seeking inclusion as joint owners of Peninsula under Section 5(2) (b), (c) and (d), 49 U.S.C. 5(2) (b), (c) and (d). The Milwaukee and Southern Pacific appeal from the district court's affirmance without opinion, together with the Port of Portland and the Public Utility Commissioner of Oregon. The United States joins the appellants in urging that the judgment below be reversed.

A. THE RIVERGATE COMPLEX AND PENINSULA'S IMPORTANCE TO IT

The developing Rivergate Industrial District occupies the 2,942 acre tip of a peninsula formed by the confluence of the Columbia and Willamette Rivers. Rivergate's six miles of waterfront will provide dock-sites for direct deepwater access to the Pacific Ocean. The Port of Portland has expended more than five million dollars of public funds there for planning, construction and development, and it is estimated without challenge that ultimate public and private investment in industrial and port facilities at Rivergate will exceed 500 million dollars (A. 57–59, 228–229).

As conceived by its public developers, the Rivergate complex will be served by a domestic transportation network capable of providing efficient and economical service to and from points throughout the nation. To achieve this the Port's consultants, in an 18-month

study, recommended construction of an internal rail system by the Port to provide Rivergate industries unrestricted direct access to all Portland line-haul carriers (A. 5). At full development, rail traffic generated by these industries is expected to reach between 500 and 600 cars per day, with a projected annual volume of five million tons of freight (A. 57-59).

Peninsula's relationship to the Rivergate complex is shown by the simplified map set forth as an appendix to the joint brief for the appellants.[2] As that map shows, Peninsula's 3.79 miles of track are one of the two existing means of access to Rivergate by rail, providing the northern point of entry to the property. This track extends along the Columbia River shore under the Burlington Northern main line, to which it is connected at its southeast end by interchange tracks owned in part by Peninsula and in part by Burlington Northern and Union Pacific.[3] The other terminal connecting to Rivergate is Barnes Yard to the south, a facility already owned by Union Pacific. It is located between the two rivers and connects at Rivergate's boundary with the Port of Portland's tracks coming from industries located at Rivergate's Willamette River shore. By existing agreement (A. 303), only Union Pacific and Burlington North-

[2] A more detailed map appears opposite A. 354. Unless otherwise indicated, all "Map" references in this brief will be to the simplified map.

[3] Peninsula already serves the 40-acre pole yard of the Crown Zellerbach Corporation, located at the eastern end of Rivergate, over industrial tracks owned by that corporation (See map).

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ern's subsidiary SP&S will have direct assess to Barnes Yard.

Accordingly, the effect of exclusive control of Peninsula by Burlington Northern and Union Pacific will be to assure that only those two carriers would have direct access to existing facilities reaching Rivergate. The other two line-haul carriers now serving Portland, Milwaukee and Southern Pacific, will have to switch and interchange their Rivergate traffic with these carriers. This process can take as long as 30 hours after the cars of the Milwaukee and Southern Pacific reach the Portland area (A. 97–100). These switching problems are described further at pp. 15–16, *infra*.

Peninsula, the last independent terminal company in Portland, was organized in 1918 to provide switching facilities for the stockyards and other industries located at North Portland Station. Over the years, the traffic generated by these companies has changed materially, and rail traffic dependent upon stockyard operations, traditionally the leading industry, is declining. Peninsula's present owner, United Stockyards Corporation, is not a carrier and has no interest in operating a railroad independent of its stockyard operations. It therefore has been willing to sell its stock in Peninsula at its appraised value, and has no preference as to the purchaser (A. 39–41). On February 28, 1967, United entered into an agreement to sell the stock of Peninsula to Union Pacific and SP&S (A. 146).

B. THE APPLICATION AND THE PETITIONS FOR INCLUSION

SP&S and Union Pacific filed their joint application for Commission approval of the acquisition on July 25, 1967 (A. 137). The application pointed out the importance of Peninsula's tracks to the developing Rivergate complex and the applicants' plan to use the tracks to serve the new complex (A. 143-144). While no immediate changes in Peninsula traffic and revenues were said to be anticipated, the applicants asserted "that within the foreseeable future substantial new traffic and revenues will be derived as a result of the development of the said River Gate Industrial Area by the Port of Portland Commission." *Id.* at 144.

In response to the application, the Milwaukee and the Southern Pacific filed petitions seeking inclusion as joint and equal owners of Peninsula pursuant to Section 5(2)(b), (c) and (d), 49 U.S.C. 5(2)(b), (c) and (d), and the right to use tracks necessary to connect their own lines with Peninsula's tracks under Section 3(5), 49 U.S.C. 3(5). The Milwaukee and Southern Pacific submissions stated that the participation in Peninsula's control would assure adequate, flexible and efficient rail service to Rivergate, and that exclusive ownership of Peninsula by the SP&S and Union Pacific, which already control the Barnes Yard access terminal, would impede meaningful participation by the Milwaukee and Southern Pacific in Rivergate's planned development. In addition, the Milwaukee independently contended that its inclusion in the proposed acquisition is essential to give full effect to the conditions then proposed in the Northern Lines merger case (and since adopted) to enhance the

Milwaukee's competitive status by giving it direct access to Portland (A. 162, 164, 180–181).

The protective condition referred to by the Milwaukee had been agreed to by the Northern Lines on October 24, 1966 (A. 332), and was one of the reasons for the Commission's reopening its prior disapproval of the Northern Lines merger on January 4, 1967, and ultimately approving the merger. See *Great Northern Pacific & Burlington Lines, Inc.—Merger, etc.—Great Northern Railway Company, et al.*, 331 I.C.C. 228, 231; this subsequent approval of the merger on November 30, 1967, was ultimately affirmed by this Court in the *Northern Lines Merger Cases, supra*. The condition (set forth at A. 327) provides that Milwaukee shall have direct access on an equal basis to Portland and Portland industries over SP&S tracks, which include the track leading to the connection with Peninsula.[4] The record in the reopened Northern Lines case had been concluded and was under submission to the Commission before the application to acquire Peninsula was filed on July 25, 1967, and the Commission's decision approving the merger and adopting the Milwaukee protective condition had been served twelve days before Burlington Northern and Union Pacific responded on December 27, 1967, to Milwaukee's peti-

[4] Milwaukee's point of connection for Peninsula traffic is the Guild's Lake yard on the SP&S line approaching the connection with Peninsula (Map point "2"). Southern Pacific connects to the same line at the nearby Hoyt Street terminal (Map point "3"), as well as to Union Pacific's lines via East Portland (Map point "5") and Albina yard (Map point "6").

tion for inclusion in the Peninsula acquisition.[5] Those responses urged that Milwaukee's inclusion was not required by the Northern Lines condition and was not in the public interest (A. 175, 177). Burlington Northern and Union Pacific also objected to Southern Pacific's inclusion.

C. THE COMMISSION PROCEEDINGS

The Peninsula applications, petitions and responses were referred to a Commission examiner for hearing on a consolidated record. The Port of Portland, the Portland Commission of Public Docks, the Public Utility Commissioner of Oregon, and the Crown Zellerbach Corporation, a major shipper with plants in Rivergate and North Portland Station served by Peninsula, intervened in support of joint control of Peninsula by all four railroads. The intervenors maintained that four-carrier control of Peninsula was essential to the rapid development of efficient and modern rail transportation at Rivergate (A. 199–247). A full evidentiary hearing was held and the examiner filed a detailed recommended report and order (A. 69–133). Noting that the Milwaukee would soon be a line-haul carrier serving Portland directly in accord with the Northern Lines merger condition, the examiner concluded that four-carrier control of Peninsula would promote economical and functionally modern rail transportation for Rivergate and relieve

[5] Two subsequent reports on reconsideration were issued by the Commission. See, 331 I.C.C. 869 (April 11, 1968); 333 I.C.C. 391 (June 17, 1968). The Commission's initial Report and Order denying the merger applications had been rendered March 31, 1966. 328 I.C.C. 460.

existing inefficiencies in Peninsula's services. He further determined that unrestricted ownership would best serve the interests of affected shippers by eliminating existing disparities in switching charges and providing on-line service to the greatest number of points. The examiner therefore recommended approval of the sale of Peninsula's stock control to the SP&S and Union Pacific, conditioned upon the inclusion of the Milwaukee and Southern Pacific on equal terms and the granting of related trackage rights sought by the latter carriers.

Upon exceptions filed by the SP&S, Union Pacific, and others, the Commission (Division 3) limited its approval of the proposed acquisition to the two original applicants, thus giving Burlington Northern and Union Pacific the sole right to control the Peninsula access to Rivergate (A. 11–67). The Commission ruled that the protective conditions adopted in the Northern Lines merger case had no bearing on the Milwaukee's present petition, and that "a denial of its petition for inclusion would take nothing from Milwaukee that it was granted in the *Northern Lines* case nor be contrary in any way to the spirit and intent of the Commission to accord Milwaukee the right of access into Portland over *Northern Lines* trackage" (A. 29). The Commission then went on to find that because neither the Milwaukee nor the Southern Pacific had ever directly connected with Peninsula, their direct service to Peninsula's industries would constitute a new operation and an improper "invasion" of SP&S and Union Pacific territory (A. 30–31). In examining the need for service by all four carriers and the competitive effect

of joint ownership the Commission declined to look beyond the past traffic using Peninsula's facilities to the future needs of the growing Rivergate complex. Rather, it found that dilution of the declining demand of Peninsula's historic customers would have adverse effects upon Burlington Northern and Union Pacific that "would outweigh any advantage accruing to SP, Milwaukee, and the Rivergate industries of four-railroad ownership" (A. 33).

D. THE DISTRICT COURT'S JUDGMENT

The Commission's decision was challenged in the court below by the Port of Portland and the Public Utility Commissioner of Oregon, later joined by the Milwaukee and Southern Pacific. The United States filed an answer supporting the plaintiffs. Without rendering an opinion, the three-judge district court dismissed the complaints in an order and judgment dated July 9, 1970 (A. 9). This appeal by the public bodies and the excluded rail carriers followed (A. 585).*

ARGUMENT

INTRODUCTION AND SUMMARY

This case concerns the rail transportation needs of the great port and industrial facility now being developed at Rivergate. Peninsula Terminal—the last terminal in Portland not controlled by major trunk-line carriers—presently connects with Rivergate's

*The Commission postponed the effective date of its order granting control of Peninsula on December 8, 1969, pending the outcome of these proceedings (A. 583).

northern entry. The southern entry is already controlled by Burlington Northern (SP&S) and Union Pacific on terms designed to exclude other carriers from direct access at that point. Peninsula Terminal is therefore the only existing facility from which the two other carriers directly serving Portland can have equal direct access to the strategic facility at Rivergate. Direct multi-line service by all Portland carriers is essential to the development of the port as an international gateway and as an industrial center in the Northwest. Moreover, without a share in Peninsula, the hard-pressed Milwaukee will not have the ability to serve the developing Rivergate market directly that the giant Burlington Northern and Union Pacific will have; to this extent the competitive promise made to the Milwaukee by the Northern Lines merger conditions will be broken. Moreover, the public served by Milwaukee across the Northern Tier, as well as the public served by Southern Pacific in California and the Southwest to New Orleans, will be denied direct line access to Rivergate, to the detriment of the port's future expansion as well as the needs of the areas served by these lines.

The Commission disregarded these consequences by focussing upon Peninsula's limited present traffic, rather than on the traffic that Rivergate will generate in the future, in contravention of its own precedents and the National Transportation Policy. Moreover it adopted a standard of territorial exclusivity which disregards the public interest in the development of competitive and efficient direct line rail service. Finally, the Commission's decision is inconsistent with the

substance of the Northern Lines condition which specifically afford the Milwaukee direct entry into Portland with the purpose of making it a viable transcontinental competitor of the Burlington Northern.

I. IN FAILING TO FOCUS ITS INQUIRY ON THE FUTURE TRANSPORTATION NEEDS OF THE RIVERGATE DEVELOPMENT, THE COMMISSION APPLIED STANDARDS INCONSISTENT WITH THE NATIONAL TRANSPORTATION POLICY

A. THE APPLICATIONS AND THE PETITIONS FOR INCLUSION CLEARLY RAISED QUESTIONS AS TO THE NEW RIVERGATE PORT DEVELOPMENT AND THE NEED FOR DIRECT RAIL ACCESS TO IT

There can be no doubt on this record that access to Rivergate's future development was the principal concern of the applications of the Milwaukee and the Southern Pacific for inclusion in the Peninsula transaction under Section 5(2), and for terminal rights under Section 3(5). It was as well the concern of the Port of Portland and the other public bodies which intervened in support of those carriers. It is equally clear that Peninsula Terminal's strategic value to the applicant lines, Burlington Northern (SP&S) and the Union Pacific, and hence the reason for their application, was its proximity to Rivergate. The applicants' focus on Rivergate and its future traffic is plainly shown by their application itself, which stressed the new traffic and revenues to be derived within the foreseeable future from Rivergate (A. 144); from the testimony of their officials that the purpose in acquiring control of Peninsula was to obtain direct access and control of Rivergate's northern entrance (A. 380) and to stop Milwaukee and

Southern Pacific from direct access to Rivergate (A. 412, 432, 459, 470); and by the terms of the contract between SP&S and Union Pacific relating to facilities at Rivergate's southern entrance (Barnes Yard), which gave each carrier a veto over any grant by the other of any trackage rights into Rivergate.[7]

Thus the real underlying question in the Commission proceedings was whether the applicants should be allowed exclusive direct access to the traffic to be generated in increasing volume by the industries locating at Rivergate. Without such direct access the other carriers will, as the examiner found, be at a severe service and rate disadvantage which will not only injure them but will deny the port direct on-line service to and from the points they serve to the east

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[7] This contract (A. 303), which was signed on May 26, 1967, provided that the track being jointly built from Barnes Yard into Rivergate was for the exclusive use of SP&S and Union Pacific unless both agreed on a third party's use (Art. I, Sec. 6, A. 305). Article IX provided that the same terms would apply to any other trackage springing from the SP&S line in the direction of Rivergate (A. 313). SP&S General Manager Westergard testified that the contract assured direct joint rail service by the Northern Lines (SP&S, Northern Pacific and Great Northern) and Union Pacific (A. 385) under the same restrictions applicable at Barnes Yard (A. 384).

We point out that this agreement and the February 1967 Peninsula agreement—both plainly designed to exclude Milwaukee (and Southern Pacific) from access to the Rivergate market in Portland—were entered into by the Northern Lines during the very same period when they were urging their October 1966 agreement to give Milwaukee full access to all Portland industries as a major reason for the Commission to allow them to merge in the Northern Lines Proceedings that had been reopened in January 1967.

and south. These disadvantages will take the form of rate and cost burdens and operational delays resulting from switching requirements.

A line-haul railroad which must surrender cars to another carrier for switching to the consignee, or which must have them switched to it from the shipper's facility, must either impose the additional switching costs on the shipper or absorb them itself. It is customary for a line-haul carrier moving a shipment to or from a point where it competes directly with another carrier to absorb the switching costs; if the shipment is moving to or from a noncompetitive point the carrier will ordinarily pass them on to the shipper. Failure to absorb switching costs from competitive points results in a severe competitive disadvantage. Thus, to the extent that Milwaukee and Southern Pacific cannot arrange direct service into Rivergate, they will have either to impose switching costs on their customers, which will discourage use of their lines, or they will have to absorb the costs with a consequent reduction in the revenue available to cover their costs of operation. Either way they will be severely handicapped, since there are practical economic limits on the amount which can be absorbed (A. 212–215, 243–246, 341–342, 346–347, 439–440, 460–466, 470–473).

In addition, there are significant operational disadvantages which a carrier dependent upon switching services of another carrier will encounter. At present over 30 hours are lost in moving Southern

Pacific cars between its Portland interchange points and Peninsula (A. 97). The examiner found that given the short distance involved this is not satisfactory service, and it represents a serious competitive disadvantage (A. 120–121, 123). The Milwaukee suffers a similar disadvantage. Its traffic entering Portland from the north over the SP&S main line, which passes directly by Peninsula terminal, can reach Peninsula only through a connection at the Guild's Lake Yard (map point "2"), about six miles south of Peninsula (A. 100). Its cars bound for Peninsula must then be switched by SP&S back up to Peninsula—a backhaul which requires at least 24 hours (A. 100). Like the Southern Pacific, therefore, Milwaukee can serve Rivergate via Peninsula only with severe operational delays that impair both its service and competitive abilities.[8]

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[8] The Commission has frequently observed that terminal carriers possess an inherent advantage in obtaining the line-haul traffic of industries. See, *e.g.*, *St. Louis Southwestern Railway Co., et al.—Purchase—Alton & Southern Railroad*, 331 I.C.C. 515, 534; *Norfolk and Western Railway Company—Control FP&E Company—Purchase—Fairport, Painesville and Eastern Railroad Company*, 330 I.C.C. 672, 680; *City of Hialeah, Florida* v. *Florida East Coast Railway Co.*, 317 I.C.C. 34, 37; *Control of California Traction Company*, 131 I.C.C. 125, 135–136. The examiner found that (A. 84–85):

"* * * a representative of SP&S doubts that carriers with no direct Rivergate access rights would have as much incentive to do business there as a direct access carrier. Normally the switching carrier has a solicitation advantage. If Milwaukee has no direct Rivergate access on competitive traffic it must absorb an SP&S switching charge (presently 6 cents a hundredweight) and pay a Peninsula rate division of $29.95 a car when the car revenue exceeds $60, on its traffic which would

These disadvantages are not compensated by the Commission's condition that Peninsula be operated without discrimination and that all existing junctions and gateways be maintained (A. 35–36). This simply institutionalizes the existing disadvantages in rates, service, and competitive ability outlined above.

The importance of multi-line service to the future of Rivergate was strongly emphasized in the record. Rivergate is still in the relatively early stages of its development (A. 199, 229). But it will generate in the future an enormous traffic volume moving to all parts of the nation (A. 201–208), and presents a major opportunity for use of new technology in rail service (A. 209). Evidence submitted by the developers showed that its future as a port and industrial facility will depend significantly upon its ability to offer direct line service on all the major railroads entering Portland. Carriers which cannot offer such service will have little incentive to encourage industries to locate there (A. 207–215, 232), Certain types of industries, such as steel, will require facilities to handle large unit trains. Others will require the most direct movement of containerized ocean cargo by trailer-on-flatcar or container-on-flatcar service. To the extent that such shipments must be delayed for switching, the time and cost advantages of unit train operation and containerization will be lost and the port itself will suffer a disadvantage in relation to other West Coast ports

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move through East St. Johns. * * * The SP&S representative concedes that if Milwaukee owns no part of Peninsula and cannot use the North Portland interchange tracks; it cannot compete equally with SP&S for Peninsula traffic."

(A. 222, 243). The Port of Portland, like other large port facilities, has therefore made multiline service one of the keystones of its development policy for Rivergate (A. 212–213, 219–220).

To be sure, the Port of Portland has not yet finally determined whether the northern access to Rivergate will ultimately be through expanded Peninsula facilities or a new line springing from the SP&S main line in that area, or perhaps some combination of the two (A. 539, 543, 545, 547). But at present, the Peninsula line is the only northern access facility in existence, and it already serves one Rivergate plant. It is plain, therefore, that Peninsula is at the very least a crucial legal and economic foothold for future access, and the parties incontestably approached the Commission proceedings in that light. Thus, the question before the Commission was unavoidably the question whether this one remaining independent access facility, and with it service to Rivergate as a whole, should become the private preserve of Burlington Northern and Union Pacific, or whether it should be opened in meaningful fashion to all four carriers serving Portland.

B. THE COMMISSION'S FAILURE TO CONSIDER THE PUBLIC INTEREST IN MULTI-LINE SERVICE TO THE RIVERGATE DEVELOPMENT WAS INCONSISTENT WITH THE APPLICABLE LEGAL STANDARDS AND THE COMMISSION'S OWN PAST APPROACH TO SIMILAR CASES

In other cases involving the development of similar port and industrial facilities, the Commission has looked upon the needs of the area to be served as a whole, placing the highest value on future rather than historic convenience and necessity. It has emphasized

the traffic potential of developing ports from the broad viewpoint of the nation's foreign and domestic commerce; the needs both of industries now or hereafter to be located in the port for direct, multi-line service; and factors such as elimination of switching charges, improved car movement, expedited land-ocean interchange, and enhanced inter- and intra-modal competition.

In such proceedings the public body charged with development of the port has been heard on behalf of shippers because, in the most real sense, it is the spokesman for the port's future. See, *e.g.*, *"The Calumet Port Case," Illinois Central R. Co. Construction and Trackage,* 307 I.C.C. 493, 527, 529, sustained *sub nom. Illinois Central R. Co.* v. *Norfolk & Western R. Co.,* 385 U.S. 57; *Atchison, T. & SF. Ry. Co. Construction,* 261 I.C.C. 227, 236; *City of Milwaukee* v. *C. & N. W. Ry. Co.,* 279 I.C.C. 521, 526, 530–531. The guiding standard applied with respect to terminal railroads in the past has been that: "In the interest of efficient and economical operation and the free movement of traffic, restrictions in service and discriminations in charges which have arisen from differences in local terminal situations should cease to be a feature of railroad operation." *Consolidation of Railroads,* 159 I.C.C. 522, 523. In short, the Commission's previous decisions in this area have been faithful to the National Transportation Policy (49 U.S.C. preceding Section 1), which enjoins it to administer the provisions of the Act "to the end of developing coordinating, and preserving a national transportation system by water, highway and rail, as well as

other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." Appendix, *infra*, p. 34.

Instead of following these established principles here, the Commission narrowly confined its consideration of the public interest to the limited—and indeed declining—historic traffic of the Peninsula Terminal facility without regard to the new development of the Rivergate port facilities. It gave no reason for this restricted approach except to recite the conclusion that the presence of Southern Pacific and Milwaukee in the general Portland area does not give them the right to serve all industries there (A. 26–27, 30). Looking at Peninsula without regard to the great facility developing beside it, it concluded that direct service by Southern Pacific and Milwaukee to Peninsula "would constitute a new operation and an invasion of the joint applicant's territory" (A. 30). The Commission did not even consider what the foreseeable transportation needs of the Rivergate industrial complex would be, much less find that it would not support the operations of the four Portland rail carriers. Rather, it simply considered the declining traffic served by Peninsula apart from Rivergate, concluding that it would adversely affect Burlington Northern and Union Pacific if they had to share that traffic with others and that, *ipso facto*, inclusion would not be in the public interest.

This narrow approach to the case amounted, we submit, to a failure by the Commission to decide the case the parties presented to it, and, indeed, the case that the National Transportation Policy and Section

5(2) required the Commission to decide before it could conclude that the acquisition without the inclusion of the other carriers was "consistent with the public interest." The Commission did not consider the competitive and other effects of the exclusive control it was giving the applicants over the two rail entries to the real market in issue—Rivergate. It ignored the consequences its decision will have on the Milwaukee and the Southern Pacific's opportunity for access, and on the shipping public's present and future interest in multi-line service there. No mention was made by the Commission of the existing marginal competitive significance of the Milwaukee recognized by the Commission and this Court in *Northern Lines*. See 396 U.S. at 497. Nor was attention given to the need of shippers from, to and through Rivergate for direct line service to the Southwest and the Southeast via the Southern Pacific, which serves a vast area not reached by the applicants. There was no discussion of the comparative benefits to shippers of multi-line service from a developing port facility or of the rate disadvantages and handling delays which attend its absence. Thus, the Commission did not balance the adverse competitive effects that its grant of the application would have, and so did not fulfill the obligations imposed on it by the National Transportation Policy.

It is well established that it is not enough for the Commission to judge a rail acquisition in terms of the private interests of the acquiring and acquired parties. Rather, it is the public interest in optimum rail service that is the touchstone, and that public interest

must be evaluated in particular cases in terms of efficiency, safety and costs as well as the effects of competition. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87. This duty is particularly great where applications under Section 5(2) are involved because any transaction approved by the Commission under that section is relieved from the operation of the antitrust laws. *Northern Lines, supra*, 396 U.S. at 504. The Commission must cast a searching, objective eye upon arrangements carriers have agreed to among themselves, for it has been observed that these giant corporations have a natural tendency " 'to compromise their own differences at the expense of the unorganized public'." *Baltimore & Ohio R. Co.* v. *United States*, 386 U.S. 372, 436, 437 (Brennan, J., concurring). This responsibility extends beyond the provisions of Section 5(2) to every provision of the Act which may affect the choice to be made between monopolistic and competitive service. See *Denver & Rio Grande Western R. Co.* v. *United States*, 387 U.S. 485, 492, 495.[9] Cf. *Illinois Central R. Co.* v. *Norfolk &*

[9] Of course the Commission need not follow the identical analysis or make the same findings as would be required in an antitrust suit. *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154, 156–157. But as the *Calumet Port* case makes clear, competitive direct line service is a major factor in the public interest. Cf. *F.M.C.* v. *Svenska-Amerika Linien*, 390 U.S. 238, 245, n. 4. And the Commission has always recognized that because of the limited nature of access to major port facilities and crucial gateways, arrangements for equal access to terminal facilities at such points are essential. Compare *United States* v. *St. Louis Terminal*, 224 U.S. 383, with *St. Louis S.W. Ry. Co.—Pur.—Alton & S.R.*, 331 I.C.C. 515, involving access to the St. Louis terminal and switching district.

Western R. Co., 385 U.S. 57 (affirming the *Calumet Port* case). The Commission's analysis in this case did not even purport to meet that responsibility.

The Commission's adoption in this case of a standard of territorial exclusivity as the standard for evaluating petitions for inclusion in mergers and acquisitions is entirely inconsistent with these principles. The exclusivity standard is apparently derived from cases involving the different matter of authority to construct or extend new railroad lines under Section 1(18) of the Act. But the purpose of that section is, in contrast to the merger section, "to enable the Commission, in the interest of the public, to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service." *Chesapeake & Ohio R. Co.* v. *United States*, 283 U.S. 35, 42; *Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U.S. 14, 37. And even with respect to new construction, carriers have no legal right to exclusive occupancy of a territory or to protection from loss incidental to competition if the Commission, by applying correct standards, finds that the public interest requires additional service. *Indian Valley Railroad* v. *United States*, 52 F. 2d 485 (N.D. Cal.); *Pennsylvania R. Co.* v. *United States*, 40 F. 2d 921 (W.D. Pa); see *Illinois Central R. Co. Construction and Trackage*, 307 I.C.C. at 527–528; *Chesapeake & Ohio R. Co. Construction*, 267 I.C.C. 665, 679.[10] The application for inclusion in Pe-

[10] Dicta in *Texas & Pacific Ry.* v. *Gulf etc. Ry.*, 270 U.S. 266, 277; and *St. Louis S. W. Ry.* v. *Mo. Pac. R. Co.*, 289 U.S. 76, 81–82, partially quoted by the Commission in its Motion to Affirm (pp. 7–8), do not establish the validity of the principle of

ninsula does not involve any risk of improvident construction, but rather the sharing of a limited facility for the purpose of furnishing multi-line service to a developing port facility. And the Commission has made no finding that the inclusion would cause any harmful diversion of Rivergate's foreseeable rail traffic.

If the Commission's territorial approach here is sustained, then Burlington Northern and Union Pacific will have achieved their admitted purpose (see p. 13–14, *supra*) of foreclosing Milwaukee and Southern Pacific from direct access to Rivergate (A. 412, 432, 459, 470; see also A. 384–385). Since Burlington Northern (SP&S) and Union Pacific alone have previously offered direct single-line service to industries and facilities located in Rivergate, it will be their exclusive preserve, as one Union Pacific official candidly admitted (A. 470). Far from "protecting the territory" of Burlington Northern and Union Pacific from "invasion," the Commission's ruling here will in fact enable these two giants to block the other carriers from effective access to the new Rivergate territory and deny Rivergate industries the service of the other carriers.

The only case cited by the Commission's report (A. 31) for its concept of "territorial exclusivity," *Minneapolis, St. P. & S.S.M.R. Co. Acquisition,* 295 I.C.C. 787, 802, underscores the fallacy of its reason-

territorialization. Those cases were concerned with the right of carriers to enjoin competition from new construction which had not been authorized by the Commission and not the standards the Commission is to apply when determining whether to authorize such construction.

ing. There, the Commission denied applications of other lines to undertake new construction in territory traditionally served on a direct basis by the North Western because the North Western's economic vulnerability made preservation of its exclusive territory important to the public interest. 295 I.C.C. at 798. In the instant case the positions of the parties are precisely reversed: the joint applicants are relatively secure rail carriers, as found in the *Northern Lines* case (328 I.C.C. at 471; 331 I.C.C. at 282–283), while the Milwaukee is a weak line whose service to the Pacific Northwest requires protection (331 I.C.C. at 271; 396 U.S. at 515). Thus, the *Minneapolis* case supports the conclusion that the acquisition of exclusive control of the Rivergate markets by the two strongest rail carriers, to the detriment of a financially weak competitor, is contrary to the public interest. Moreover, given the strength of Burlington Northern and the Union Pacific, the counterbalancing strength of the Southern Pacific would spur them to better service.

II. IN DENYING THE MILWAUKEE'S PETITION FOR INCLUSION, THE COMMISSION ERRONEOUSLY EXCLUDED FROM ITS CONSIDERATION THE CONDITION IT HAD IMPOSED IN THE NORTHERN LINES MERGER CASE EXPRESSLY REQUIRING BURLINGTON NORTHERN TO GRANT MILWAUKEE TRACKAGE RIGHTS TO SERVE PORTLAND INDUSTRIES

In the *Northern Lines Merger Cases,* 396 U.S. 491, this Court sustained the Commission's decision authorizing creation of the powerful Burlington Northern system, of which the SP&S line here in question is a part. The competitive position of the Milwaukee

was a central element in the administrative proceedings leading to approval of the merger, and in this Court's affirmance of the Commission's decision. See, *e.g.*, 396 U.S. at 496–497, 500. The Commission's initial decision disapproving the merger had been based in substantial measure on the adverse impact it would have on the relatively weak Milwaukee, the only source of rail competition for the dominant Northern Lines across the Northern Tier States. 328 I.C.C. 460, 488–500, 528. When the Commission subsequently decided, on reconsideration, to approve the creation of the Burlington Northern, a fundamental justification for its change of position was the merger parties' agreement to protective conditions, by which the Commission found that the Milwaukee "will be substantially strengthened as a meaningful transcontinental competitor" of the combined Great Northern and Northern Pacific. 331 I.C.C. 228, 271–273; see 396 U.S. at 516.

The principal condition intended to strengthen the Milwaukee is Condition 24(a), which for the first time provides for direct access by the Milwaukee into the Portland area by use of Burlington Northern (SP&S) tracks. This Condition, whose adoption was anticipated in the Milwaukee's petition for inclusion in control of Peninsula (See pp. 7–8, *supra*), provides in part (331 I.C.C. at 357; A. 327) that Burlington Northern

> * * * shall grant to the Milwaukee * * * trackage rights to operate freight trains over * * * [Burlington Northern] lines between Longview Junction and Portland, including the

> right to serve on an equal basis *all present and future industries* at Portland and intermediate points and the use of * * * [Burlington Northern] facilities at Portland necessary for the switching of traffic to other railroads and industries. [*Emphasis added*].

This Condition was of crucial competitive importance because, as this Court observed, the Milwaukee's "past failure to become a meaningful competitor came in large part because its lines did not reach into Portland, Oregon * * *." 396 U.S. at 515. The condition is necessary, the Court noted (*ibid*), because "[i]n a strictly competitive situation it is understandable that neither of the Northern Lines would interchange traffic with the Milwaukee except on its own terms and this destined that the Milwaukee would fail to become a true transcontinental line even though its western terminus lay within a few miles of Portland with the latter's access to the sea."

By its action here the Commission perpetuates just such detrimental advantages as were previously enjoyed by the Burlington Northern at the expense of the Milwaukee, in what is plainly destined to become one of the leading industrial and port areas in the Pacific Northwest. The promise of the Northern Lines merger, to establish the Milwaukee as a "meaningful competitor" for the vital long-haul traffic between Portland and the Northern Tier States, cannot be fulfilled unless this condition is effectuated in the present context and the Milwaukee is given direct and unconditional access to these important terminal facilities at Portland. For the reasons we have already shown,

the severe competitive and operational disadvantages suffered by a carrier without direct access to Rivergate will gravely impair Milwaukee's Portland service. *Supra* pp. 15–16.

In the Commission's view, the Milwaukee's equal access to Peninsula was not compelled, in letter or spirit, by the *Northern Lines* protective conditions because (A. 29):

> this case cannot be viewed as part of the general realignment of western railroad competition resulting from the Commission's approval of the *Northern Lines* merger. Condition No. 24 of the *Northern Lines* case grants Milwaukee the right of access to Portland and the right to serve industries therein; however, this condition is applicable only to *Northern Lines* trackage and territory. The condition is silent with respect to trackage and territory in which other carriers, such as UP, have a joint interest and the effect of the condition upon such joint trackage and territory was not presented to, nor considered by, the Commission. Furthermore, the instant application and Milwaukee's petition for inclusion therein, were not filed until after the record was closed in the *Northern Lines* case, and not until long after the *Northern Lines* applicants had agreed to Milwaukee's request for imposition of Condition No. 24. Thus, the purchase of Peninsula by the joint applicants was not within the contemplation of the Commission at the time Condition No. 24 was imposed. Milwaukee's inclusion in that purchase cannot, therefore, be considered to implement that condition; and a denial of its petition for inclusion would take nothing

> from Milwaukee that it was granted in the *Northern Lines* case nor be contrary in any way to the spirit and intent of the Commission to accord Milwaukee the right of access into Portland over *Northern Lines* trackage.

This attempt to explain away the plain language of the Condition—which expressly gives Milwaukee all trackage rights necessary "to serve on an equal basis all present and future industries at Portland"—is, we submit, specious. Whether or not the Peninsula problem was specifically within the Commission's contemplation at the time it approved the Northern Lines merger (after the application and petitions for inclusion had been filed in the instant case) is plainly irrelevant to the operation of the Condition. The Commission made clear in *Northern Lines* that the Condition was imposed in the exercise of its plenary power in Section 5(2) cases to impose conditions necessary to safeguard the public interest. 331 I.C.C. at 286; see also *Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 486, 496. The Condition was as broadly phrased as it was precisely because the Commission could not divine every situation that might arise in the future but wished to assure that the competitive assistance being given Milwaukee as the price of the merger would continue to be meaningful. If the Commission can now limit—without any consideration of any competitive justification—the obligation it gravely imposed in *Northern Lines*, if it can now allow Burlington Northern to retract the promise by which its very existence as a merged carrier purported to be justified, the premises upon

which this Court decided the *Northern Lines* case will be largely nullified.[11]

The Commission's argument that the Portland Condition is impotent here because Burlington Northern has entered into contractual relations with Union Pacific is equally unfounded. The short answer to this contention is that the Commission's authority cannot be limited by private contractual arrangements that a regulated railroad chooses to make. As the Commission observed when an attempt was made to narrow another of the Milwaukee protective conditions by private agreement: "Regardless of any understanding the applicants and Milwaukee may have had among themselves however, or the interpretation now put on their agreement, those matters do not bind us and cannot displace our responsibility to condition approval of the merger upon terms required by the public interest." *Great Northern Pacific—Merger—Great Northern,* 333 I.C.C. 391, 393. If Burlington Northern alone had applied for leave to acquire Peninsula, Milwaukee would plainly have been entitled under Condition 24(a) to reach Rivergate directly

[11] It is no answer to declare that the Milwaukee may now seek relief from the Commission in a reconstituted *Northern Lines* proceeding (A. 29). Such a proceeding is unnecessary, as the Commission here acknowledged when it recognized its statutory jurisdiction to consider the Milwaukee's petition in the instant control proceeding (A. 25–26). Requiring the Milwaukee to begin its petition anew in the *Northern Lines* proceeding, in which the Union Pacific is not now a party, achieves nothing which the Commission could not properly accomplish here, where all carriers and affected shippers are present, other than to seriously delay and further burden the Milwaukee's infant Portland operations.

through it. The joinder of Union Pacific with Burlington Northern in a contract relating to Burlington Northern's trackage serving present and future Portland industries, adopted while the Milwaukee conditions involving that same service were before the Commission, cannot lawfully diminish Milwaukee's rights under Condition 24(a). There is no reason why Burlington Northern should be allowed to do jointly what it could not do alone.

In any event, the circumstances of the Burlington Northern-Union Pacific agreement and the temporal sequence of events preclude any argument that Union Pacific's interests should not be affected by the Milwaukee protective conditions. The Northern Lines' agreement to the conditions, on October 24, 1966, preceded by more than three months their agreement of February 28, 1967, with Union Pacific for the acquisition and operation of Peninsula. In the meantime, the Northern Lines merger proceeding had been reopened in January primarily for re-consideration of the Milwaukee conditions, including Condition 24(a), as set forth above, and certain labor agreements. Union Pacific actively participated in the reopened proceeding in opposition to the grant of the Milwaukee conditions and particularly with respect to the entry of the Milwaukee into Portland; the Commission concluded that the public interest in granting the Milwaukee direct and equal access to Portland outweighed the Union Pacific's asserted injury, particularly since "the addition of the Milwaukee as a competitor at Portland would be somewhat offset by the elimination of Northern Pacific and Great North-

ern as separate competitors." 331 I.C.C. at 282–283.

Thus, in view of Union Pacific's awareness of the pendency of the proceedings that eventuated in the Condition before it contracted with Burlington Northern, and indeed its participation in those proceedings, it hardly seems unfair to subject its asserted contractual rights to the Condition. Moreover, the contract by its express terms (A. 146, 156) as well as by operation of law (49 U.S.C. 5(2)(b) and 5(4)) was subject to the Commission's approval and any conditions the Commission might impose in the public interest. And in addition, at the time of the contract Burlington Northern (SP&S) was under an obligation as the signatory and beneficiary of the 1966 agreement with Milwaukee underlying the Portland Condition not to take any action to interfere with Milwaukee's rights thereunder. Union Pacific had a similar obligation as a third party aware of that agreement. Cf. Ann. 83 A.L.R. 33; Corbin, Contracts § 1470; Restatement, Contracts §§ 571, 576.[12] The contract for acquisition of Peninsula was therefore plainly subject to the Commission's approval of Condition 24(a) in whatever form it might finally take.

[12] The agreement between the Milwaukee and the Northern Lines for Milwaukee's entry into Portland, dated October 24, 1966 (A. 332), did not expressly refer to Peninsula Terminal, since SP&S at that time had not contracted to acquire an interest in it. However, it contemplated that Milwaukee would have the right to use SP&S main line, which passes directly by Peninsula Terminal's connection to the SP&S main line (Map, point "7"), into the SP&S yard at Hoyt Street (Map, point "3") "with the right to handle freight traffic to or from Longview Junction, Portland, and all intermediate points regardless of origin or destination of said traffic." (A. 333, 334)

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed and the case remanded to the Commission for further consideration in accordance with the standards required by the Interstate Commerce Act and the prior decisions of this Court and the Commission.

Respectfully submitted.

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APPENDIX

The National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding Section 1, provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8, 12, 13 and 19 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 3(5) of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. 3(5), provides:

> 3(5) Terminal facilities; use of and compensation for.
>
> If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the prineiple controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

Section 5(2) of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. 5(2), provides in relevant part:

> 5(2) Unifications, mergers, and acquisition of control.
>
> * * * * * *
>
> (b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor

carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

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